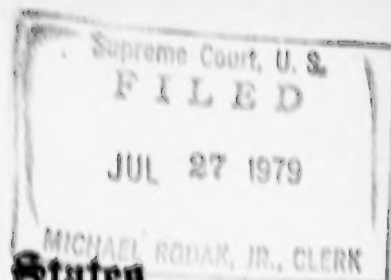


**78-1855**  
IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978



**No. 1855**

PAUL W. MILHOUSE and EWING T. WAYLAND, Being  
Those Persons upon Whom Service of Process Was Attempted  
on Behalf of THE UNITED METHODIST CHURCH, a  
Named Defendant in the Underlying Action,

*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA,

*Respondent,*

AND

CHARLES W. TRIGG, et al.,

*Real Parties in Interest.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

**No. 1855**

PAUL W. MILHOUSE and EWING T. WAYLAND, Being  
Those Persons upon Whom Service of Process Was Attempted  
on Behalf of THE UNITED METHODIST CHURCH, a  
Named Defendant in the Underlying Action,

*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR THE  
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*Respondent,*

AND

CHARLES W. TRIGG, et al.,

*Real Parties in Interest.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Real Parties in Interest, Charles W. Trigg, et al., respectfully  
request that this Court deny the Petition for Writ of Certiorari  
seeking review of the Order of the Ninth Circuit Court of Appeals  
denying Petitioners' Petition for Writ of Mandamus to review  
the interlocutory decision of the United States District Court for  
the Southern District of California denying Petitioners' Motion  
to Dismiss the action against the United Methodist Church.

**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED**

1. Is a hierarchical or connectional religious denomination,  
which is organized and governed pursuant to a constitution, by-



laws, and rules of operation providing a comprehensive system of church government, including a supreme legislative body, a central treasury, and a Council of Bishops in charge of its temporal and spiritual affairs, and which operates through a nationwide structure of local churches, annual conferences and missional agencies, suable as an unincorporated association under Rule 17(b) of the Federal Rules of Civil Procedure?

2. Does a civil action against an unincorporated association for violation of the federal securities laws violate the due process rights of individual members and constituent units of the association neither named nor served when federal law prohibits satisfaction of a judgment against an unincorporated association from the individual assets of unnamed and unserved members of the association?

3. May a court in a civil action by private citizens seeking damages for wrongful secular conduct consisting of violations of the federal securities laws rule that a religious organization is suable as an unincorporated association under federal law without violating the constitutional guarantee of religious freedom when the religious organization's witnesses opine it is not so suable?

## STATEMENT OF THE CASE

### A. *Factual Background.*

Plaintiffs' complaint ("Complaint") alleges violations of the federal securities laws in connection with the sale of \$5 million principal amount of Collateral Trust Bonds ("Bonds") to obtain funds for Pacific Homes, a non-profit corporation operating several retirement facilities in California, Arizona and Hawaii. Ex. No. 1 to Affidavit of William S. Lerach dated June 30, 1978

("Lerach Affidavit").<sup>1</sup> Named as defendants are The United Methodist Church ("UMC"), Pacific Methodist Investment Fund ("PMIF"), The General Council on Finance and Administration of the United Methodist Church ("GCFA"), The Pacific and Southwest Annual Conference of the United Methodist Church ("PSWAC"), Francoeur & Co., and a number of directors or officers of PMIF, PSWAC or Pacific Homes.

The Complaint alleges that Pacific Homes was the agency, alter ego and was under the control and domination of UMC, GCFA, PSWAC, and PMIF (collectively referred to as the "Church Defendants"). Complaint ¶¶ 3, 4, 5. The Complaint alleges that the defendants knowingly employed devices, schemes and artifices to defraud in connection with sale of the Bonds, including twenty specified false and misleading statements or omissions in prospectuses and other sales literature. Complaint ¶ 9.<sup>2</sup>

Pacific Homes sold life care contracts whereby in return for a lump sum payment it promised to provide shelter, food, medical and nursing care at no additional cost for the remainder of a resident's life. Pacific Homes, however, used the money obtained from the sale of prepaid life care contracts to build new

<sup>1</sup> This Affidavit authenticates some 74 exhibits including The Book of Discipline of the United Methodist Church ("BOD/UMC") (1976 ed.) which comprise substantially all of the evidence upon which Plaintiffs' predicated their factual showing that UMC was an unincorporated association.

<sup>2</sup> On August 13, 1978, the District Court denied the motions of the Church Defendants to dismiss the Complaint for failure to state a claim upon which relief could be granted, for failure to plead fraud with the required particularity, for improper venue and for a more definite statement (with one exception not here relevant).



facilities and to make speculative real estate investments, instead of setting it aside in liquid investments to provide funds for resident care in future years. The real estate investments went sour, Pacific Homes found it increasingly difficult to sell new life care contracts, and the corporation's financial condition deteriorated. Lerach Affidavit, Ex. Nos. 57-59. By the late 1960's Pacific Homes was in financial difficulty. Lerach Affidavit, Ex. Nos. 20-26.

In March 1968, Bishop Kennedy (UMC's Bishop in charge of PSWAC and a member of both the Board of Directors of Pacific Homes and UMC's Council of Bishops) was specifically informed of Pacific Homes' financial situation by defendant Francoeur who advised the Bishop that the situation must be kept secret in order to continue to sell life contracts:

Fortunately for Pacific Homes at this point, the financial position of the Corporation is not widely known for, if the seriousness were generally known, Pacific Homes would have additional problems from the standpoint of attracting residents. . . .

Please bear in mind that if adverse publicity comes to light it would be difficult, if not impossible, to sell the accommodations each year, and, therefore, we feel that the situation must be rectified immediately. For the church's sake alone these problems must be resolved for, even if the Methodist Church is not legally responsible in this instance and even if a moral obligation were not assumed, the damage that would be done to the reputation and credit of the Methodist Church would be of tremendous magnitude.

Lerach Affidavit, Ex. No. 59 at 3, 6.

To raise capital during this period of financial deterioration, Pacific Homes commenced a "Conversion Financing Plan," which included obtaining \$5,000,000 through the public sale of

bonds to the plaintiff class.<sup>3</sup> Despite this additional capital Pacific Homes' financial position continued to deteriorate, and in 1977 Pacific Homes entered bankruptcy proceedings. On April 27, 1978, the Bonds were declared in default. Lerach Affidavit, Ex. No. 27.

#### B. *The Proceedings Below.*

On August 15, 1978, the District Court denied UMC's motion to dismiss the action as to UMC and refused to certify its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). UMC sought an emergency stay from the Ninth Circuit pending the filing of a Petition for Mandamus, which the Ninth Circuit denied on September 14, 1978, stating:

In order to allow this Court to consider the merits of petitioners' emergency motion for stay pending filing of petition for writ of mandamus, the emergency motion is treated as a petition for writ of mandamus in its own right and is hereby denied.

Appendix Ex. No. A. UMC thereafter filed a Petition for Mandamus which the Ninth Circuit denied on March 13, 1979. It is this Order that Petitioners seek to have this Court review.

On September 15, 1978, a default was entered against UMC for failure to answer within the time allowed by law. On January 8, 1979, the District Court certified this action as a class action on behalf of the Bond purchasers. On July 16, 1979, the District Court denied UMC's motion to set aside the default, and set plaintiffs' motion for entry of final judgment against the defaulting defendant, UMC, for hearing on October 30, 1979, which if granted will result in an appealable judgment.

<sup>3</sup> The Bonds were sold to the public by PMIF who used the proceeds to purchase bonds issued by Pacific Homes, thus generating capital for Pacific Homes. Lerach Affidavit, Ex. Nos. 60-63.

C. *Related Matters in This Court.*

Petitioners admit that the "essential issues raised" in their Petition for Writ of Certiorari will also be presented in a Petition to be filed by them in a companion state court litigation, *Barr v. United Methodist Church*, 90 Cal.App.3d 259, ..... Cal. Rptr. .... (1979). UMC Petition at 4. *Barr* is a class action on behalf of the residents of Pacific Homes seeking specific performance of the residents' life care contracts, or damages for breach of contract, fraud and statutory violations.

On March 8, 1979, the California Court of Appeal unanimously held that:

- a) UMC is a hierarchical religious organization suable as an unincorporated association under California law (90 Cal.App.3d at 263-272);
- b) Due process considerations do not bar an action for fraud, breach of contract and statutory violations against UMC (*Id.* at 272-273); and,
- c) The constitutional guarantee of freedom of religion does not bar an action for fraud, breach of contract and statutory violations against UMC by private citizens complaining of wrongful secular conduct (*Id.* at 273-276).<sup>4</sup>

<sup>4</sup> The California Superior Court previously ruled that GCFA operated as "the central treasury and fiscal agent of the United Methodist Church," received and collected UMC's "general church funds" amounting to over \$60 million in 1976, of which "many millions" came from California, "controls the purse-strings of the United Methodist Church and dominates all church activities in the nation." The California appellate courts refused to disturb that ruling. GCFA filed a Petition for Writ of Certiorari and sought a stay from Mr. Justice Rehnquist. Mr. Justice Rehnquist denied the stay and thereafter the full Court denied GCFA's petition. *General Council on Finance and Administration of The United Methodist Church v. Superior Court*, ..... U.S. ...., 99 S.Ct. 35 (1978) (Rehnquist, J., in chambers), *cert. denied*, ..... U.S. ...., 99 S.Ct. 281 (1978).

(This footnote is continued on next page)

On May 17, 1979, the California Supreme Court, without dissent, denied UMC's Petition for Hearing. UMC thereafter sought a stay of the *Barr* action from Mr. Justice Rehnquist pending this Court's action on its Petition for Writ. *Barr, et al. v. The United Methodist Church, et al.*, No. A-1084. On June 26, 1979, Mr. Justice Rehnquist denied the requested stay. UMC then applied to Mr. Justice Brennan for a stay. On June 27, 1979, Mr. Justice Brennan referred UMC's renewed stay application to the entire Court, which denied the stay, Mr. Justice White and Mr. Justice Blackmun taking no part in the consideration or decision of the application.

## ARGUMENT

### I.

#### UMC DOES NOT ATTEMPT TO MEET THE REQUIRED STANDARD FOR GRANTING OF MANDAMUS

UMC asks this Court to review the Ninth Circuit's denial of its Petition for Mandamus, but nowhere in its Petition for Certiorari does UMC attempt to demonstrate that it meets the standards required to obtain mandamus.

Only exceptional circumstances justify the extraordinary relief of mandamus. *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Petitioners have the heavy burden of showing that they are *clearly and indisputably* entitled to such relief. *Kerr v. United*

*quist* denied the stay and thereafter the full Court denied GCFA's petition. *General Council on Finance and Administration of The United Methodist Church v. Superior Court*, ..... U.S. ...., 99 S.Ct. 35 (1978) (Rehnquist, J., in chambers), *cert. denied*, ..... U.S. ...., 99 S.Ct. 281 (1978).

*States District Court, supra* at 403; *Will v. United States, supra* at 96; *Bankers Life & Casualty Company v. Holland*, 346 U.S. 379, 389 (1953). Writs of mandamus are available only in unusual circumstances where a lower court's action amounts to a "usurpation of power." *Kerr v. United States District Court, supra* at 402. "As extraordinary remedies, they are reserved for really extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and their use is always discretionary with the issuing court. *Kerr v. United States District Court, supra* at 403.

The Petition should be denied because Petitioners have not even attempted to demonstrate that Petitioners are entitled to relief by way of mandamus. Moreover, what Petitioners seek through the appeal of the denial of mandamus is this Court's review of a determination by the trial court as to whether UMC is structured, organized and operating as an unincorporated association.

## II.

### PETITIONERS LACK STANDING

Petitioners seek relief for a named defendant, the United Methodist Church. However, the Petitioners are not UMC, but rather three individual officials of UMC who specifically disclaim any power or authority to speak for UMC. UMC Petition at 6. According to their Petition, the action they request this Court to take is neither for their benefit nor the benefit of someone they represent. If Petitioners' version of their status is accepted, they lack standing to petition this Court because they are not aggrieved. They also lack standing to raise the constitutional rights of individuals or entities not before the Court.

#### A. Petitioners' Disclaimer of Representative Status Deprives Them of Standing to Argue UMC's Position.

Petitioners state that they cannot speak or act for the whole church.<sup>5</sup> *Id.* Neither of these persons has been named as an individual defendant in this action. Given this disclaimer of repre-

<sup>5</sup> UMC asserts that it was not properly served because those persons served by Plaintiffs "personally had no authority to receive service of process for the entire denomination." UMC Petition at 6. This argument is no more than the mirror image of its "UMC is not a jural entity" argument. If UMC is an unincorporated association, it follows that service on the organization can be accomplished in accordance with the rules generally applicable to service on unincorporated associations set forth in Federal Rule of Civil Procedure 4(d)(3).

The summons and complaint in this action were served upon Ewing T. Wayland, General Secretary and Treasurer of GCFA and Treasurer of UMC. GCFA is directed by Paragraph 907(4) of BOD/UMC to protect UMC's legal interests. Paul W. Milhouse, a Bishop of UMC and then President of UMC's Council of Bishops, was also served. Bishops of UMC are each "general superintendents of the whole Church." BOD/UMC ¶ 50 at 34-35; Glossary at 602; ¶ 525 at 227. Hence, the individuals served were authorized to receive service on behalf of UMC. Fed. R. Civ. P.4(d)(3). See *Georgia v. National Democratic Party*, 447 F.2d 1271, 1273 n.2 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971.)

The authority of Petitioners to receive service of process cannot be negated by UMC's stating they are not so authorized. See *Price v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers*, 46 F.R.D. 18, 21 (E.D. Pa. 1969); cf. *Boyd v. Grant Trunk Western R. Co.*, 338 U.S. 263, 265-266 (1949); *Home Ins. Co. of New York v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

The due process purpose of assuring UMC fair notice and providing an opportunity to be heard has been well satisfied here. Service is sufficient if made upon an individual in a relationship with the organization that makes it fair to imply authority on his

(This footnote is continued on next page)



sentative status, Petitioners have no personal stake in the litigation's outcome.

Petitioners as individuals cannot show that they will be benefited in a concretely demonstrable way from a decision holding that UMC is not suable as a jural entity. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Warth v. Seidin*, 422 U.S. 490, 503-507 (1975).

The applicable test for standing here is that Petitioners must show a particularized injury to themselves caused by Plaintiffs' conduct that is substantially likely to be redressed by the relief sought. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). Petitioners do not meet this test. They cannot show that their position will be altered in any way by obtaining the remedy they seek. Reversing the District Court would not restore to Petitioners any rights of which they are now deprived. Petitioners themselves are in exactly the same position after the decision they question here as they were before it. Cf. *Zablocki v. Redhail*, ..... U.S. ...., 98 S.Ct. 673, 678 n. 6 (1978). They have failed to demonstrate the constitutional element of standing that an injury to themselves is likely to be redressed by a decision in their favor. *Regents of University of California v. Bakke*, ..... U.S. ...., 98 S.Ct. 2733, 2743-44 n. 14 (1978).

part to receive service. *American Football League v. National Football League*, 27 F.R.D. 264, 268 (D.Md. 1961); cf. *International Shoe Company v. Washington*, 326 U.S. 310, 320 (1945). Executive officers of UMC were served and that service provided due process notice. *Diapulse Corp. v. Birtcher Corp.*, 362 F.2d 736, 741 (2d Cir.), cert. dismissed, 385 U.S. 801 (1966); *Operative Plasterers' & Cement Finishers' International Association v. Case*, 93 F.2d 56, 65-68 (D.C. Cir. 1937); *Cannell v. Oskoian*, 23 F.R.D. 307, 312 (D.R.I.), aff'd, 269 F.2d 311 (1st Cir. 1959).

B. *Petitioners Lack Standing To Assert The Constitutional Rights of Others Not Before The Court.*

Ordinarily a litigant has standing to seek redress for injury done to him, but not to others. E.g., *Singleton v. Wulff*, 428 U.S. 106, 123-124 (1976) (Powell, J., concurring in part and dissenting in part); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-168 (1972); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943); *United States v. Fury*, 554 F.2d 522, 525-526 (2d Cir. 1977), cert denied, 433 U.S. 910 (1978). Petitioners challenge the District Court's decision on due process grounds claiming that Plaintiffs seek to sue all Methodists. As a threshold matter, Petitioners have no standing to assert the due process rights of either these individuals or UMC.

Petitioners have structured their argument in a manner that undercuts the prudential element of *jus tertii* standing and that places them in a position analogous to that of the Sierra Club in *Sierra Club v. Morton*, 405 U.S. 727 (1972). There, Sierra Club did not rely on injury to its members in order to show standing. Instead, it argued that it should be accorded standing based solely on its expertise in environmental matters. *Id.* at 735 n. 8, 739-741. Petitioners here attempt the same ploy by eschewing representation of anyone other than themselves yet arguing the due process rights of organizations and individuals not named, not served and not in any way threatened by this action.



### III.

#### THE DISTRICT COURT'S DECISION FINDING UMC SUABLE AS AN UNINCORPORATED ASSOCIATION WAS LEGALLY AND FACTUALLY CORRECT AND CONSTITUTIONALLY SOUND

As evident from a reading of the issues framed in UMC's Petition, UMC's argument proceeds from the essential premise that UMC has no officers, executive board or other decision making mechanism and no assets. UMC attempts to induce this Court to act under the belief that this premise is true by suggesting that the District Court decided that "any aggregation of individuals promoting a common objective under a common name is an 'unincorporated association.'" UMC Petition at 15.

The District Court fully considered and examined the substantial evidential record and correctly decided that UMC is an unincorporated association because it is organized and governed pursuant to a constitution, by-laws and rules of operation providing a comprehensive system of church government including a supreme legislative body, a central treasury (GCFA) and a Council of Bishops in charge of its temporal and spiritual affairs.

UMC asks this Court to disregard the substantial evidence in the record concerning the organization, structure and operation of UMC which leads to a result contrary to its wishes. Moreover, UMC would require this Court to ignore years of established case law to the effect that UMC is a hierarchical religious association, including the recently decided case of *Jones v. Wolf*, 47 U.S.L.W. 4962 (July 2, 1979) which specifically refers to UMC as a hierarchical association. Moreover, *Jones v. Wolf* cited and quoted with approval the Georgia Supreme Court's decision in *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, cert. de-

nied, 429 U.S. 322 (1976) which expressly recognized that UMC is "a hierarchical religious association" and that a local UMC church is "part of the whole body of the general church and is subject to the higher authority of the organization and its law and regulations." *Id.* at 38 (quoted in *Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4965).

UMC does not directly contend, although the suggestion is clear, that this Court or other civil courts must adopt the opinions of its witnesses. See UMC Petition at 20, 29 n. 15. It simply finesses the matter by phrasing the issues as though those opinions are the "facts" of the case. The real issue in this case remains unchanged: can the civil courts rule, as the District Court did here, that UMC can be sued by private citizens for wrongful secular conduct even though UMC's witnesses' opine that it cannot be sued.

Because UMC challenges the determinations of the District Court concerning the organization, structure and operation of UMC, stating that "there is no factual basis for any conclusion that the denomination operates with a centralized structure or authoritarian polity" (UMC Petition at 21), Plaintiffs first present a small portion of the extensive record together with a discussion of the applicable law supporting the decision below. Plaintiffs then briefly discuss why there are no constitutional issues raised by UMC's Petition.

#### A. *Suits Against Unincorporated Associations Generally.*

Pursuant to Rule 17(b) of the Federal Rules of Civil Procedure, Plaintiffs have sued UMC as an unincorporated association for the "purpose of enforcing for or against it a substantive right existing under . . . the laws of the United States."

Permitting suits against unincorporated associations correctly recognizes the important role such organizations play in modern society. Society values unincorporated associations' activities and assures their success by allowing them to sue, but society also protects individual rights by making unincorporated associations amenable to suit.

[I]nasmuch as a fictional entity has been recognized by the law for the purpose of benefiting and protecting unincorporated associations in both the substantive and adjective senses, as by protection against embezzlement of funds, by giving right to appear in statutory arbitrations and before official boards, and, more recently, by giving rights to represent workers in collective bargaining, *so also the fictional entity must in common fairness be recognized for the protection of those dealing with such associations and claiming that in such dealing their legal rights have been violated.*

*Operative Plasterers' & Cement Finishers' International Association v. Case*, *supra* 93 F.2d at 64-65 (emphasis added, footnote omitted). See also *Barr v. UMC*, *supra*, 90 Cal.App.3d at 264-267.

Plaintiffs dealt with UMC as an association. They purchased Bonds sold by PMIF, "a subordinate body of the Southern California-Arizona Annual Conference," (Lerach Affidavit, Ex. Nos. 60-63) for the express purpose of financing an organization "sponsored by The United Methodist Church" (Lerach Affidavit, Ex. Nos. 48, 60 at 750, 61 at 757, 62 at 764, and 63 at 771), held out as an "agency of The United Methodist Church" (Lerach Affidavit, Ex. Nos. 1 at 3, 17 at 256, 47), and identified in UMC publications as affiliated with and certified by UMC, and thus "entitle[d] to identify itself as an agency of The United Methodist Church." Lerach Affidavit, Ex. No. 19 at 31.

Courts, federal and state, have consistently permitted suits

by and against diverse types of groups, including religious groups, as unincorporated associations. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975) (Environmental Societies); *Schlesinger v. Reservists Committee To Stop the War*, 413 U.S. 208 (1974) (Organization of Veterans); *Moose Lodge No. 107 v. Irvis*, *supra* (Social Clan); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (Church); *United Mine Workers v. Coronado Coal Company*, 259 U.S. 344 (1922) (Labor Unions); *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) (National Republican Party); *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) (National Republican Party); *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 502 P.2d 1049, 104 Cal.Rptr. 761 (1972) (Environmental Societies); *Daniels v. Sanitarium Association, Inc.*, 59 Cal.2d 602, 381 P.2d 652, 30 Cal.Rptr. 828 (1963) (Labor Union); *Marshall v. I. L. & W. Union*, 57 Cal.2d 781, 371 P.2d 987, 22 Cal.Rptr. 211 (1962) (Labor Union); *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931) (Stock Exchange); *California State University v. National Collegiate Athletic Association*, 47 Cal.App.3d 533, 121 Cal.Rptr. 85 (1975) (Athletic Organization); *White v. Cox*, 17 Cal.App.3d 824, 95 Cal.Rptr. 259 (1971) (Condominium Owners); *Juneau Spruce Corp. v. I. L. & W. Union*, 119 Cal.App.2d 144, 259 P.2d 23 (1953) (Labor Union); and *Herald v. Glendale Lodge*, 46 Cal.App. 325, 189 P.329 (1920) (Lodge).

Moreover, UMC *itself* has heretofore been sued as a defendant, *United Methodist Church v. St. Louis Crossing Independent Methodist Church*, 150 Ind. App. 574, 276 N.E.2d 916 (1971), and it has sued as a plaintiff, *The United Methodist*

*Church v. Sparrow*, Civil No. 6881 (Superior Court of Dooly Co., Georgia 1976).

Capacity to sue or be sued is determined by federal common law where, as here, federal rights are asserted. *Associated Students of University of California v. Kleindienst*, 60 F.R.D. 65, 67 (C.D. Cal. 1973); *National Association For Community Development v. Hodgson*, 356 F.Supp. 1399, 1402 (D.D.C. 1973); *Klebanow v. New York Produce Exchange*, 344 F.2d 294, 299 (2d Cir. 1965); *Action Alliance for Senior Citizens of Greater Philadelphia v. Shapp*, 400 F.Supp. 1208, 1212 (E.D. Pa. 1975); *United Industrial Corporation v. Nuclear Corporation of America*, 237 F.Supp. 971, 977 (D. Del. 1964); *Feldberg v. O'Connell*, 338 F.Supp. 744, 746 (D. Mass. 1972).

In *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971), the National Republican Party, contended that it was not an unincorporated association and was therefore improperly named as a defendant. Georgia proffered evidence in the form of the Party's rules and by-laws, membership solicitation forms taken from the Party's magazine, a 1969 Party Membership Card, and, among other things, a cancelled check made payable to the Republican Party. The Court of Appeals found that Georgia's evidence was "persuasive" and that the National Republican Party was properly named. 447 F.2d at 1273, n.2.<sup>6</sup>

<sup>6</sup> As demonstrated in Section III.B., *infra*, Plaintiffs offered abundant evidence of the hierarchical structure of UMC, including the BOD/UMC as well as other evidence. This Court recognized in *Jones v. Wolf*, *supra*, the importance of the BOD/UMC in establishing the structure of UMC, including certain trust provisions of BOD/UMC crucial to the maintenance of ownership and control by UMC over local church property. The District  
(This footnote is continued on next page)

## B. UMC As An Unincorporated Association.<sup>7</sup>

### 1. Overview

UMC is organized, exists and operates pursuant to the BOD/UMC

which is the official published statement (revised quadriennially to reflect actions of the General Conference) of the Constitution and laws of The United Methodist Church, its rules

Court likewise, recognized the importance of the BOD/UMC to the organization and specifically referred to the trust clause provision in its oral opinion. Petitioners' Appendix C at A-10. In addition to the BOD/UMC, other evidence demonstrates UMC's structure as an unincorporated association. UMC has membership cards. Leiffer Deposition at 47. Plaintiffs produced a recently cancelled check made payable to UMC. Lerach Affidavit, Exhibit No. 32. The check was sent with a letter addressed to the "United Methodist Church, 1200 Davis Street, Evanston, Illinois 60201." Lerach Affidavit, Exhibit No. 33. The letter said: "I am sending my check for \$10.00 to further the work of the United Methodist Church." The check was cashed by UMC, endorsed by UMC's treasurer (the GCFA), and a receipt from the GCFA was returned to the sender of the letter. Lerach Affidavit, Exhibit No. 34. Thereafter, GCFA forwarded the money to the General Council on Ministries of UMC which applied the funds to a "missional priority" designated as "Hunger." Lerach Affidavit, Exhibit No. 72. Dr. Murray H. Leiffer (upon whose affidavit UMC relied to support its proposition that UMC is not an unincorporated association) opined that it "would be impossible" to write a check to UMC; that no one would have authority to cash a check payable to UMC; and that he knew of no vehicle that exists to take monies written to UMC, cash and process them. Leiffer Deposition at 46-47.

<sup>7</sup> UMC suggests that its mere size exempts it from suit as an unincorporated association. Size does not prevent a group from being treated as an unincorporated association. Indeed, it was the size of unincorporated groups that first gave rise to the entity theory of associational law permitting suits against associations per se to avoid the inconvenience, expense and delay of suing the  
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of organization and procedure, and a description of administrative agencies and their functions.

*BOD/UMC* Glossary at 601. See also *Jones v. Wolf*, *supra* 47 U.S.L.W. at 4963. The *BOD/UMC* states: "The United Methodist Church has become the *legal and ecclesiastical successor* to all property, property rights, powers, and privileges of The Evangelical United Brethren Church and The Methodist Church . . ." *BOD/UMC* ¶ 819 at 328 (emphasis added); see also *BOD/UMC* ¶ 1 at 20 ("legal successor of the two uniting churches").

UMC is capable of owning and owns property. *BOD/UMC*, ¶ 6 at 21. UMC is a party to contracts. *BOD/UMC*, ¶ 670-671 at 253.<sup>8</sup> UMC is one of the named insureds and a party to a contract of insurance providing comprehensive general liability insurance with coverages in excess of \$1,000,000,000. This contract states that the business of the "named insured" is to be a "religious organization." Lerach Affidavit, Ex. No. 29 at

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members and units of the association. See *Jardine v. Superior Court*, *supra* 213 Cal. at 307-308. In *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), this Court noted:

It would be unfortunate if an organization . . . in directing the conduct of 400,000 members . . . out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes. To remand persons injured to a suit against each of the 400,000 members, to recover damages and to levy on his share of the strike fund, would be to leave them remediless.

259 U.S. at 388-389.

<sup>8</sup> Moreover, the *BOD/UMC* is a contract between the parent denomination and its members. *Western Pennsylvania Conference of the United Methodist Church v. Everson Evangelical Church of North America*, 312 A.2d 35, 38 (Pa. 1973).

A2737. UMC has employees. *BOD/UMC*, ¶ 1701 at 485.<sup>9</sup>

UMC owns and/or controls schools, hospitals and homes. *BOD/UMC*, ¶ 2445 at 557.

## 2. *The Structure Of The Church*

### a. *The General Conference*

The supreme body of UMC is its General Conference, "[t]he legislative body for the entire Church," which meets every four years. *BOD/UMC* Glossary at 598. The General Conference has the power to define and fix the powers, duties and privileges of church membership, of elders, deacons and preachers, of the Annual, Central, District and Charge Conferences and of the episcopacy; to establish commissions for the general work of the church and to provide a judicial system and procedures to direct all connectional enterprises of the Church. *BOD/UMC* ¶¶ 12-15 at 22-25.

### b. *The Council Of Bishops And The Episcopacy*

UMC's Council of Bishops has "oversight of the spiritual and temporal affairs of the whole Church" and is "the corporate expression of episcopal leadership in the Church." *BOD/UMC* ¶ 525 at 227. Individual Bishops of UMC are each "general superintendents of the whole church" and together comprise the "episcopacy," the UMC system of government whereby Bishops serve as general superintendents of UMC. *BOD/UMC* ¶ 50 at 34-35; Glossary at 602; ¶ 525 at 227. Individual Bishops

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<sup>9</sup> Employees of Pacific Homes were treated as lay employees of UMC for pension purposes. Lerach Affidavit, Ex. No. 74. Pacific Homes was advised by its counsel that its retirement plan was exempt from the Employee Retirement Income Security Act of 1974 as a "church plan" because Pacific Homes was an "agency of a church" since it was "controlled by a church." Lerach Affidavit, Ex. No. 75.



have "presidential supervision" in their jurisdiction and are "to lead and oversee the temporal affairs of The United Methodist Church." *BOD/UMC* ¶ 54 at 35; ¶ 513 at 221.

District superintendents of UMC are ministers (appointed yearly by the Bishop) who administer the work of the church within a district. *BOD/UMC*, Glossary at 599, 602, ¶ 514 at 222, ¶ 527 at 228.<sup>10</sup> The Bishops and district superintendents have the "task . . . to see that all matters, temporal and spiritual, are administered in a manner . . . faithful to the mandate of the church." *BOD/UMC* ¶ 501 at 212. These superintending officers are the "formal leadership in The United Methodist Church." *BOD/UMC* ¶ 501 at 212.

c. *The Annual Conferences*

UMC has 74 Annual Conferences in the United States. An Annual Conference is "the basic administrative body" of UMC "bearing responsibility for the work of the Church in a specific territory." *BOD/UMC* Glossary at 597. Each Annual Conference has a "Cabinet" consisting of "[t]he resident bishop and the district superintendents of an Annual Conference . . . ." *BOD/UMC* Glossary at 595. These Cabinets "exercise meaningful corporate leadership" by meeting "at stated intervals."

<sup>10</sup> This is a unique system and operates to insure that UMC has control over local churches. Unlike some denominations, local UMC churches have no power to select their own pastor—this function being reserved for the Bishops of UMC. The courts have recognized the importance of this to the parent church. *E.g., Goodson v. Northside Bible Church*, 261 F.Supp. 99, 102 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967) ("Under this system, ministers are assigned to churches by the officials of the parent body rather than by act of the local congregation. The ministers are thus subject to the control of the parent rather than the local body.").

*BOD/UMC* ¶ 526 at 227-228. "The Cabinet is charged with the oversight of . . . the temporal affairs of a conference . . . ." *BOD/UMC* ¶ 526 at 228.

d. *Local UMC Churches*

Local churches are organized under and are subject to the *BOD/UMC* and governed by the Charge Conference. *BOD/UMC* Glossary at 595. The Charge Conference is "the connecting link between the local church and the general Church" and has "general oversight of the Administrative Board(s) of the local Church(s)." *BOD/UMC* ¶ 243 at 123. A local church cannot buy or sell real estate or build or buy a new church without authorization of the Charge Conference, the pastor and the district superintendent. *BOD/UMC* ¶¶ 2429, 2431, 2432, 2433, 2440 at 547-554. Trustees of a local church hold its property in trust *not* for the local church but for the parent UMC. *BOD/UMC* ¶ 2401 at 532.

e. *UMC's Central Treasury*

In 1974, in seeking a "group [tax] exemption to be granted in the name of the United Methodist Church and its affiliated organizations," GCFA represented to the Department of the Treasury that it was "the central treasury and fiscal agent of The United Methodist Church." Walton-Myers Deposition, Exhibit No. 3 at 2. The exemption was granted to the "Council on Finance and Administration of The United Methodist Church, a/k/a the United Methodist Church, and Its Affiliated Organizations." Walton-Myers Deposition, Ex. No. 6 at 1.

UMC is currently operating under this group tax exemption and has not advised the federal government that any of the representations made in its application for the exemption

are false. Wayland Deposition at 59. UMC's application included the following representations:

The United Methodist Church is a connectional church governed by the General Conference under the Constitution of the United Methodist Church . . . . The Book of Discipline of the United Methodist Church is construed by law as a contractual agreement between the parent denomination and its members. Inasmuch as the subordinates and affiliates of the General Conference are an integral part of the United Methodist Church connection, acceptance of the United Methodist Church name, and the Book of Discipline of the United Methodist Church as governing legislation, constitutes a grant of authority to the General Conference to establish through legislation the governmental structures of the Church to which said affiliates and subordinates will support and adhere.

Walton-Myers Deposition, Ex. No. 3 at 1-3.

Pursuant to the group tax exemption, UMC's 1975 revenues of \$1,081,080,372 (Wayland Deposition, Ex. No. 2 at 6) were exempt from federal taxes; the exemption also operated to exempt church land, buildings, equipment and furniture valued at \$7,915,056,401 from local taxation. Walton-Myers Deposition, Ex. No. 7 at 1.

GCFA "provides property, investment, and management functions for the general church" (*BOD/UMC* Glossary at 600) and exercises "on behalf of the General Conference a property management function, by holding the title to and managing real property for the use of general agencies of the Church." *BOD/UMC* ¶ 907(3) at 338. GCFA is accountable<sup>11</sup>

<sup>11</sup> *Accountability*. The requirement upon an organized structural unit in the United Methodist Church to report, explain, or justify its action(s) to another unit in the church structure. *BOD/UMC* Glossary at 591.

and amenable<sup>12</sup> to UMC through the General Conference in all matters relating to the receiving, disbursing and reporting of general church funds. *BOD/UMC* ¶¶ 904, 906 at 330, 333. GCFA has the responsibility to "receive, collect, and hold in trust for the benefit of The United Methodist Church, its general funds . . . any and all donations, bequests, and devises of any kind . . . that may be given . . . to the United Methodist Church as such . . . ." *BOD/UMC* ¶ 906 at 336.

GCFA has the authority and responsibility to: *take all necessary legal steps to safeguard and protect the interests and rights of The United Methodist Church*; to maintain a file of legal briefs related to cases involving The United Methodist Church, and to make provisions for legal counsel where necessary in order to protect the interests of the Church at the request of a general agency or a bishop, as the Council deems advisable. . . .

*BOD/UMC* ¶ 907(4) at 338-339 (emphasis added).

GCFA's control of UMC's finances includes broad powers specifically delineated in ¶¶ 906, 907 and 910 at 335-344 of the *BOD/UMC*.

#### IV.

THE ACTION AGAINST UMC AS AN UNINCORPORATED ASSOCIATION DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF MEMBERS AND UNITS OF UMC WHO HAVE NEITHER BEEN NAMED NOR SERVED AS DEFENDANTS BECAUSE FEDERAL LAW PROHIBITS SATISFACTION OF ANY JUDGMENT AGAINST UMC FROM THEIR INDIVIDUAL ASSETS.

<sup>12</sup> *Amenability*. The requirement upon an organized unit in The United Methodist Church to answer to, act under instruction of, agree with, yield to, or submit to another unit in the church structure. *It connotes legal responsibility*. *BOD/UMC* Glossary at 529 (emphasis added).

UMC argues as though this action is against, and seeks recovery from, each of the almost 10 million individual Methodists and 43,000 local UMC churches. UMC's position exhibits an inexplicable failure to grasp the fundamental nature of a suit against an unincorporated association as an entity.

Federal case law provides that a judgment obtained against a partnership or other unincorporated association is binding upon the entity; and, if personal liability is asserted against individual defendants, judgment may be rendered against those over whom the court has personal jurisdiction but not against those who are not personally served and who do not submit to the court's jurisdiction. *Sugg v. Thornton*, 132 U.S. 524, 530-531 (1889); *Western Mutual Fire Insurance Company v. Lamson Brothers & Company*, 42 F.Supp. 1007, 1012 (S.D. Iowa 1941); *East Denver Municipal Irrigation District v. Doherty*, 293 F. 804, 806-809 (S.D.N.Y. 1923); *Esteve Brothers & Company v. Harrell*, 272 F. 382, 383-384 (5th Cir. 1921).

In *Operative Plasterers*, *supra*, the issue was whether "the North Carolina court violate[d] due process by allowing [a trade] Association to be sued as an entity." *Id.* at 62. The court concluded there was no due process problem, stating:

Theoretically, in a suit against an unincorporated association as an entity, there might be said to be a due process question in the sense of whether or not there is a party in existence before the court against whom a judgment *in personam* can be entered, but such a question seems to be determined by the *Coronado Case*. Indeed, so far as due process is concerned there is no greater problem in allowing a suit which seeks to reach a common fund to lie against an unincorporated association as an entity than there is in allowing a suit to lie against a corporation as such. The corporate entity and the unincorporated association "*entity for purpose of suit*" are both fictions of the law.

93 F.2d at 64-65 (footnote omitted) (emphasis added).

In this case, liability, if it is established, will be against UMC—not against individual Methodists or units of UMC neither named nor served in this action.

Plaintiffs *have not sued any individual member of UMC*. Plaintiffs do not, and under federal law could not, seek to bind the individual members of UMC to the judgment being sought without personally naming and serving them. If Plaintiffs ultimately prevail, it is only the common assets of the association, not the assets of its individual members, that will be available to satisfy the judgment against UMC.<sup>13</sup>

## V.

IN A CIVIL ACTION BY PRIVATE CITIZENS SEEKING  
EQUITABLE RELIEF OR MONEY DAMAGES ARISING  
FROM WRONGFUL SECULAR CONDUCT CONSISTING  
OF BREACH OF CONTRACT, FRAUD AND STATU-  
TORY VIOLATIONS, A CIVIL COURT MAY RULE,

<sup>13</sup> The assertions on pages 2, 3, 6, 19, 25, and 31 of UMC's Petition to the effect that UMC has "no assets of any kind" are directly contrary to the *BOD/UMC* which makes clear that associational funds exist and are designated "general church funds." See, e.g., *BOD/UMC* ¶ 906 at 336. These monies include at least \$60 million per year collected at the local church level and funneled through Annual Conference treasurers to UMC's central treasury, GCFA. See, e.g., Walton-Myers Deposition, Ex. No. 2 at 17-18. The District Court found "as to . . . those funds the General Council on Finance and Administration is the fiscal arm of the United Methodist Church." Petitioners' Appendix A at A-13. "To add a constitutional requirement, however, that before UMC can be recognized as an entity, plaintiffs must also identify each asset that may be reached to assure the absence of any third party claim in that asset, is to create an issue where one does not exist." *Barr v. UMC*, *supra*, 90 Cal.App.3d at 272.



WITHOUT VIOLATING THE CONSTITUTIONAL GUARANTEE OF RELIGIOUS FREEDOM, THAT A RELIGIOUS ORGANIZATION IS SUABLE AS AN UNINCORPORATED ASSOCIATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 17(b), EVEN THOUGH THE ORGANIZATION'S WITNESSES OPINE THAT IT CANNOT BE SUED.

A. *No Constitutional Issues Regarding The Freedom Of Religion Clauses Are Presented By This Action.*

UMC contends that it is constitutionally immune from this action because (i) its witnesses are of the opinion that it is not a jural entity and a court may not conclude to the contrary without rewriting UMC's polity, and (ii) a finding that UMC is suable as an unincorporated association would impair the free exercise of the Methodist faith. See UMC Petition at 2-3. In its Mandamus Petition to the Ninth Circuit, UMC insisted that the District Court "cannot constitutionally look away from the expert assistance offered to it and impose single entity status where the UMC polity admits of none." UMC Petition for Mandamus at 28.

[T]hose who call themselves Methodists have governed themselves since the formation of this State in a connectional and hierarchical form of church government. *Further, the polity of the United Methodist Church and its predecessor organizations is readily identifiable as a hierarchical church structure. No reason for inquiry into church doctrine or interpretation of ecclesiastical law is necessary to reach this conclusion.* See Book of Discipline U.M.C. (1968), *supra*, ¶ 1501.

*Brady v. Reiner*, \_\_\_\_\_ W. Va. \_\_\_\_\_, 198 S.E.2d 812, 841 (1973) (emphasis added). See also *Carnes v. Smith*, 236 Ga. 30, 38, 222 S.E.2d 322, 325, *cert. denied*, 429 U.S. 868 (1976); *Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4965, quoting from *Carnes v.*

*Smith*, ("a local church affiliated with a hierarchical religious association 'is part of the whole body of the general church and is subject to the higher authority of the organization and its law and regulations.'").

Nevertheless, UMC seeks to establish constitutional immunity for it by telling the civil courts that in this litigation, as opposed to previous litigation where UMC was trying to protect its property interests, that they may not even look for the entity known as UMC. UMC seeks to convert its adversarial position in this litigation into a religious rite and thereby to preclude inquiry into or evaluation of evidence other than the passages of the *BOD/UMC* it prefers and the opinions of its witnesses. This position has been consistently asserted by UMC and GCFA in this and related litigation and has been rejected by the California Court of Appeal, the California Supreme Court, the United States District Court for the Southern District of California, the Ninth Circuit Court of Appeals, Mr. Justice Rehnquist, and this Court. See, *infra* at 5-7.

When a religious organization is alleged to have violated the rights of private citizens in a secular context, the courts have the power and the duty to adjudicate the dispute in accordance with the rules and laws generally applicable to all members of society. As this Court said recently in its *Jones v. Wolf* decision, "neutral provisions of state law governing the manner in which churches own property, hire employees or purchase goods" . . . "cannot be said to 'inhibit' the free exercise of religion. . . ." *Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4964. Were this not so, resolution of all secular disputes between private citizens and unincorporated religious organizations would be placed beyond the jurisdiction of the civil courts. It is no reflection on either Methodism or UMC to state the obvious — religious organizations are capable of all



forms of conduct — good and bad, helpful and harmful, honest and dishonest. The people comprising religious organizations are human beings, subject to age old human frailties and capable of inflicting harm on other citizens in the course of pursuing their religious mission. Neither they nor the persons who speak for religious organizations, whether from the pulpit or in the courtroom, are infallible.

The District Court in *Trigg* held:

Now, churches, of course, may exercise both religious and temporal powers, and the United Methodist Church, through its wide ranging, world-wide activities is, in my view, fully on the temporal scene. Its property holdings and monetary collections involve certainly millions, and perhaps billions, of dollars. In matters affecting its property rights and alleged security [sic] law violations, the United Methodist Church is able to assert its legal entitlements and is fully answerable in the courts of the United States.

Petitioners' Appendix A at A-17.

The true thrust of UMC's constitutional argument — that it has constitutional immunity from any civil action against it and cannot be held answerable for wrongful secular conduct except on its own terms, which apparently are that only certain subordinates with limited resources can be sued — was recognized by the Court of Appeal in the *Barr* action:

To defer absolutely to authoritative church experts would be to grant immunity to religious organizations in cases which might arise far afield from religious activities with the resultant effect that civil courts would then be subordinate to organizations which might attempt to classify themselves as religious to obtain the benefits of the shield of First Amendment protection.

90 Cal.App.3d at 274.

Not even in resolving church property disputes, does "the First Amendment require the States to adopt a rule of compulsory

deference to religious authority." *Jones v. Wolf, supra*, 47 U.S.L.W. at 4964. Yet, UMC asks this Court to adopt such a rule of compulsory deference in civil disputes arising from secular conduct.

It must be emphasized that this is not:

1. A suit between units of UMC or a suit seeking review of an internal church ruling or decision concerning church property, doctrine or administration;
2. A suit by a governmental agency attempting to impose upon UMC any sort of regulation; or
3. A suit in any way calling into question or affecting the manner in which Methodists exercise their beliefs or establish their Church's discipline or polity.

No case has been cited, and none has been found, where a suit against a religious organization by private citizens for breach of contract, statutory violations and tortious conduct was barred by the freedom of religion clauses of the state or federal constitutions. Every case cited by UMC to support its position involved an *internal church dispute* over church property or church administration, or the attempt of a governmental entity to impose regulations upon a church.<sup>14</sup>

In *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713 (1976), this Court established that, in *internal*

<sup>14</sup> *National Labor Relations Board v. Catholic Bishop of Chicago*, ..... U.S. ...., 99 S.Ct. 1313 (1979), cited by Petitioners at 30, is no exception. There the Court held as a matter of statutory construction that Congress did not intend the National Labor Relations Act to give the National Labor Relations Board jurisdiction over church-operated schools. The decision contains no holding of constitutional law and, in any event, involved the attempt of a governmental agency to subject religious schools to pervasive schemes of governmental regulations in the area of employee relations.

church disputes, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchial polity . . . ."

*Jones v. Wolf* underscores that the constraints placed upon civil courts apply only to intra-church disputes:

It is also clear, however, that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Id.*, at 449. Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.

*Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4963 (emphasis added).<sup>15</sup>

Additionally, Mr. Justice Rehnquist has specifically rejected GCFA's claim that opinion evidence presented by a religious organization's witnesses must be accepted without further inquiry by civil courts.

In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevic*, *supra*. But this Court never has suggested that these constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Orthodox Diocese* and the other cases cited by appli-

<sup>15</sup> The dissent in *Jones v. Wolf* makes even clearer that these constraints are with respect to intra-church disputes:

Accordingly, in each case involving an *intra-church dispute*—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. *Id.* at 4968 (emphasis added).

cant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. *Id.*, 426 U.S. at 709-710, 96 S.Ct. at 2380-2381. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract and statutory violations are alleged. As the Court stated in another context, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell v. Connecticut*, 310 U.S. 296, 306 . . . (1940).

*General Council on Finance and Administration of The United Methodist Church v. Superior Court*, *supra* 99 S.Ct. at 38.

No decision of any UMC tribunal was presented for review to the District Court. No UMC ecclesiastical tribunal has ruled that UMC is not an unincorporated association.<sup>16</sup> Therefore, even if the constitutional restraints applicable to intrachurch disputes were relevant to this secular dispute, the essential preconditions necessary to trigger the application of the judicial deference doctrine embodied in *Serbian Orthodox* are not present. The United States has not delegated to UMC the authority to transform its "ecclesiastical tribunals," created by the

<sup>16</sup> Within the past month GCFA has procured a ruling from the Judicial Council of UMC to the effect that *BOD/UMC* ¶ 907(4) does not mean what it says. Petitioners' Appendix E; UMC Petition at 24. This ruling was not presented to the lower courts and is not a part of the record on review. Moreover, the timing of this ruling immediately after the decision by the Court of Appeal in *Barr v. UMC* suggests that this ruling was collusively obtained for the purpose of seeking review in this Court. See *Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4965, n. 8. If the various entities of UMC truly have the degree of independence UMC claims, what purpose does the Judicial Council have and who is bound by the Council's decisions?

BOD/UMC for the resolution of internal church disputes into forums with the power to adjudicate the civil rights of private citizens seeking equitable relief or money damages for secular conduct in violation of federal law.

Contrary to the position UMC has taken over years in church schism disputes,<sup>17</sup> UMC has argued throughout this litigation that it is merely a loose, decentralized, non-authoritarian confederation of persons sharing common religious beliefs. Hence, UMC clearly seems to be arguing that it is congregational, as opposed to hierarchical, in structure. Indeed, whether UMC is a hierarchical religious association, as the term has heretofore

<sup>17</sup> When UMC and its subordinate units have found it to their advantage to utilize the civil courts to retain control of UMC's property in church schisms, they represent to the courts, and the courts have without exception ruled, that UMC's polity is hierarchical in the sense of being a highly centralized, integrated association. *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, cert. denied, 429 U.S. 868 (1976); *Brady v. Reiner*, \_\_\_\_\_ W.Va. \_\_\_\_\_, 198 S.E.2d 812 (1973); *Western Pennsylvania Conference of The United Methodist Church v. Everson Evangelical Church of North America*, 312 A.2d 35 (Pa. 1973); *United Methodist Church v. St. Louis Crossing Independent Methodist Church*, 150 Ind. App. 574, 276 N.E.2d 916 (1971); *Ohio Southeast Conference/Evangelical United Brethren Church v. Kruger*, 243 N.E.2d 781, 17 Ohio Misc. 8 (1968); *Trustees of Peninsula Annual Conference v. Spencer*, 183 A.2d 588 (Del. 1962); *Hoffman v. Tieton View Community Methodist Episcopal Church*, 34 Wash.2d 38, 207 P.2d 699 (1949); *Goodson v. Northside Bible Church*, 261 F. Supp. 99 (S.D. Ala. 1966) aff'd 387 F.2d 534 (5th Cir. 1967); *Brooks v. Chinn*, 52 So.2d 583 (La. 1951); *Clay v. Crawford*, 298 Ky. 654, 183 S.W.2d 797 (1944); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943); *United Methodist Church, et al. v. Sparrow*, Civil No. 6881 (Superior Court of Dooly Co., Georgia 1976); *Board of Trustees, Ohio Annual Conference v. Richards*, 58 Ohio Op. 219, 130 N.E.2d. 736 (Ohio Com. Pleas 1954).

been used is the very question which UMC seeks to preclude the courts from independently deciding in this case, arguing that the courts must accept UMC's witness' opinions as to its polity.

However, UMC cannot insist that it is not hierarchical and simultaneously invoke the judicial deference doctrine when deference is available only to organizations of hierarchical polity. *Jones v. Wolf*, *supra*, 47 U.S.L.W. at 4963, 4965; *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at 709, 713.

UMC attempts to sidestep this dilemma by admitting that it is hierarchical, but then redefines the term so that hierarchical "does not indicate that it has a highly centralized government, holds assets, or acts as an entity." UMC Petition at 23. In short, UMC wants to be hierarchical when to be so enables it to prevail over local churches in property disputes, or claim First Amendment rights, but congregational when third parties ask it to answer for its torts. UMC cannot have it both ways.

B. *Freedom Of Religious Action, As Opposed To Belief, Is Not Absolute And May Be Subjected To Neutral Legislation Having A Secular Purpose And Enacted To Ensure The Public Peace, Tranquility And Welfare.*

UMC challenges religiously neutral legislation which permits suits against unincorporated associations and is intended to facilitate legal remedies to citizens of the United States.<sup>18</sup> UMC has never claimed that Rule 17(b) of the Federal Rules of Civil

<sup>18</sup> Plaintiffs believe that the First Amendment does not apply to this secular dispute between private citizens, alleging violation of their statutory rights, and a religious organization. See Section V.A., *supra*, at 26-33. For the purpose of the following argument only, Plaintiffs are willing to assume, but do not concede, that the First Amendment does apply in this case.



Procedure is not a religiously neutral enactment. The rule involved has a legislative purpose that is entirely secular and a primary effect that neither advances nor inhibits religion.

"[A] violation of the Free Exercise Clause is predicated on coercion" and, therefore, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington v. Schempp*, 374 U.S. 203, 223 (1963). Even if legislation has a "coercive effect," it must be determined whether the impact is upon beliefs or upon conduct, since the Free Exercise Clause embraces two concepts: "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Hence, while government may not prohibit or burden religious beliefs, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); see *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978); *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

The conduct of UMC at issue in this action arises from the sale of Bonds to raise capital for the commercial operation of retirement homes. As applied to this case, Rule of Civil Procedure 17(b) does no more than require UMC to answer in court for its alleged violations of the secular rights of private citizens. The commercial sale of securities to the public by a religious organization is not a protected religious activity if, Plaintiffs, as they allege, were defrauded into purchasing the securities. *Securities and Exchange Commission v. World Radio Mission, Inc.*, 544 F.2d 535, 538-540 (1st Cir. 1976), (Defendant

religious organization unsuccessfully claimed its allegedly fraudulent actions in connection with the sale of securities to the public was entitled to First Amendment protection.); See also *Cantwell v. Connecticut*, *supra* 310 U.S. at 306 ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit fraud upon the public.").

Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, *the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.* *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (emphasis added). See also *Prince v. Massachusetts*, 321 U.S. 158, 170-171 (1944) (However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion); *De La Salle Institute v. United States*, 195 F. Supp. 891, 903 (N.D. Cal. 1961) ("The tenets of the [Catholic] Church cannot broaden the statutory exemption. What is a 'church' for purposes of the statute must be interpreted in the light of the common understanding of the word."); *Riker v. Commissioner*, 244 F.2d 220, 227-229 (9th Cir.), *cert. denied*, 355 U.S. 839 (1957) (sincere conviction and logical argument that operating a restaurant is a church function is not binding on a court).

Plaintiffs recognize that the state may not burden or restrict the free exercise of religion in the absence of a substantial and legitimate state interest. See *Wisconsin v. Yoder*, *supra* 406 U.S. at 215. Here, however, the governmental interest is substantial.<sup>19</sup> Congress has enacted the rule involved in this action

<sup>19</sup> Other governmental interests far less fundamental than those present in this case have been held to justify neutral legislation (This footnote is continued on next page)



for the purpose of permitting citizens to sue organizations functioning as unincorporated associations to remedy violations of their rights. The existence of substantive statutory rights and the procedural means to remedy their violation are the cornerstones of the concept of ordered liberty which permit all citizens of society to coexist peacefully, resolving their disputes through court procedures, thus avoiding resort to remedies of self-help with the violence and societal disruption which would inevitably flow from such action.

Conceivably [religious organizations] may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty. *Gospel Army v. City of Los Angeles*, 27 Cal. 2d 232, 245, 163 P.2d 704, 712 (1945) (emphasis added).

which directly impinges upon the rights of persons or groups to act according to their religious convictions. See, e.g., *Braunfeld v. Brown*, *supra* (state law barring retail sales on Sunday); *Prince v. Massachusetts*, *supra* (state child labor law); *King's Garden, Inc. v. Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (federal rules against sectarian employment practices); *Parker v. Commissioner*, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967) (federal income tax law); *United States v. Kissinger*, 250 F.2d 940 (3d Cir.), *cert. denied*, 356 U.S. 958 (1958) (federal agricultural marketing law); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (federal minimum wage law); *Watchtower Bible & Tract Society v. Los Angeles County*, 181 F.2d 739 (9th Cir.), *cert. denied*, 340 U.S. 820 (1950) (state property tax law).

C. *Establishment Of A Special Privilege For Religious Organizations In Secular Disputes Whereby The Opinions And Conclusions Of Their Witnesses Must Be Accepted Without Judicial Weighing Or Consideration Of Contrary Evidence Would Unconstitutionally Establish Religion.*

UMC seeks to establish a special evidentiary privilege for religious organizations involved in civil litigation arising from secular disputes which would not be available to secular organizations. UMC insists that this Court replace the specific findings of the Court below with UMC's witnesses' characterization of its structure and operation, regardless of what an objective reading of the organization's constitution and by-laws reveals. Establishment of such a privilege violates the Constitution and this Court's admonition that courts "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin v. Yoder*, *supra*, 406 U.S. at 220-221. See *Herbert v. Lando*, ..... U.S. ...., 99 S.Ct. 1635, 1648-1649 (1979).

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court recognized that many of the early settlers of this country came here to escape the oppression, persecutions and civil strife visited upon them by religious groups which had obtained governmental support for their particular doctrinal beliefs. *Id.* at 8-10. The freedom loving colonials abhorred oppressive practices of established religious sects, and it "was these feelings which found expression in the First Amendment." *Id.* at 11. Given this background, it is unthinkable that the framers of the First Amendment intended that the opinions and conclusions of members of religious organizations in secular disputes be treated as infallible.

The Establishment Clause demands governmental neutral-

ity with respect to religious belief, doctrine and dogma. *School District of Abington v. Schempp*, *supra* 374 U.S. at 226-227 (1962). It is clear that government action "establishes" religion in violation of the First Amendment when it directly aids one or all religious groups whether this aid operates to coerce non-believers or not. *Id.* at 222; *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962). Granting religious organizations the benefit of having their witnesses' opinions treated as binding on civil courts operates to establish religion by placing religious organizations beyond civil court jurisdiction and permitting them to avoid their secular legal obligations.

Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

*Reynolds v. United States*, *supra* 98 U.S. at 166-167.

UMC does not dispute the power of the courts to rule on whether UMC can be sued as an unincorporated association, so long as those courts conclude that it cannot be so used. To make available the coercive powers of civil courts to rubber-stamp the strategic postures taken by church organizations in purely secular litigation, when such deference is not accorded to secular voluntary associations, would breach the wall of separation between church and state.

## CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated this 25th day of July, 1979.

Respectfully submitted,

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## **APPENDIX A**



APPENDIX A

TO CLERK:

DATE

Re: No. 78-3044

I certify that the judges concerned concur in this order. Please file it.

United States Circuit Judge

ORIGINAL

UNITED STATES COURT OF APPEALS  
FOR THE NINTH DISTRICT

PACIFIC METHODIST INVESTMENT  
FUND, *et al.*,

*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF  
CALIFORNIA,

*Respondent,*

AND

CHARLES W. TRIGG, *et al.*,

*Real Parties in Interest.*

FILED

SEP 14 1978

EMIL E. MELFI, JR.,  
CLERK

U. S. COURT OF  
APPEALS

No. 78-3044

D.C. #78-0198

Southern Calif.

ORDER

Before: WALLACE and KENNEDY, Circuit Judges.

In order to allow this Court to consider the merits of petitioners' emergency motion for stay pending filing of petition for writ of mandamus, the emergency motion is treated as a petition for writ of mandamus in its own right and is hereby denied.